

**Loislaw Federal District Court Opinions**

HAWKINS v. BERKELEY UNIFIED SCHOOL DISTRICT (N.D.Cal. 11-20-2008)  
KEISHA HAWKINS, Plaintiff, v. BERKELEY UNIFIED SCHOOL DISTRICT, Defendant.  
BERKELEY UNIFIED SCHOOL DISTRICT, Counter-Claimant, v. JEAN MURRELL ADAMS,  
et al., Counter-Defendants.

No. C-07-4206 EMC.

United States District Court, N.D. California.

November 20, 2008

**ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS;  
GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO  
STRIKE; DENYING DEFENDANT'S SUPPLEMENTAL MOTION TO STRIKE;  
FINDING MOOT PLAINTIFF'S MOTION TO STRIKE; AND GRANTING  
PLAINTIFF'S MOTION TO DISMISS**

**(Docket Nos. 60, 66, 77, 82, and 83)**

EDWARD CHEN, Magistrate Judge

Plaintiff Keisha Hawkins filed suit against Defendant Berkeley Unified School District pursuant to the Individuals with Disabilities Education Act ("IDEA"), asserting, *inter alia*, that her son (hereinafter "Student") was denied a free appropriate public education ("FAPE"). After the Court dismissed the District's counterclaim for attorney's fees with prejudice, the parties settled the lawsuit, leaving only the issue for attorney's fees for the Court's resolution.

Currently pending is Ms. Hawkins's motion for fees and costs. In the motion, Ms. Hawkins asks to be awarded \$60,441 for fees and costs related to the administrative proceeding (representing approximately 190 hours of time) and \$70,594.90 for fees and costs related to this civil action

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(representing approximately 220 hours of time). See Mot. at 2. [\[fn1\]](#)  
In the reply brief, Ms. Hawkins asks for an additional \$11,742, representing the fees incurred "in pursuing [the fee] award in [this] proceeding." Reply at 11 (representing approximately 34 hours of time). The total amount sought is thus \$142,777.90.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Ms. Hawkins's motion for fees and costs. The Court also **GRANTS** in part and **DENIES** in part the District's motion to strike and **DENIES** the District's supplemental motion to strike. Because the Court is denying the supplemental motion to strike, Ms. Hawkins's motion to strike is moot. Finally, the Court **GRANTS** Ms. Hawkins's motion to dismiss.

**I. FACTUAL & PROCEDURAL BACKGROUND**

The IDEA requires state and local educational agencies that are receiving assistance to establish and maintain procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies." [20 U.S.C. § 1415](#)(a). One of those safeguards is the right to an impartial due process hearing upon a complaint regarding the provision of a FAPE. See *id.* § 1415(f). The findings and decision made by the hearing officer may ultimately be appealed and reviewed by a federal court. See *id.* § 1415(i)(2).

In the instant case, a due process hearing request was made on behalf of the Student on November 1, 2006. See ALJ Decision at 1 (located at Docket No. 22, Ex. A); see also Adams Decl. ¶ 8.

Actions or omissions by the District in August 2006 and thereafter were challenged. The due process hearing ultimately took place in early April 2007. See ALJ Decision at 1.

Prior to the hearing, the District made a settlement offer to the Student pursuant to the IDEA. See Rolan Decl., Ex. D (settlement offer letter, dated 3/23/2007). The District offered to provide the Student with 100 hours of compensatory education, as well as four weeks at a special summer camp,

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and further offered to convene the triennial and annual IEP for the Student within a certain time. Finally, the District offered to pay \$500 in attorney's fees to Ms. Hawkins. See Rolan Decl., Ex. D.

The settlement offer was rejected and the due process hearing proceeded, as noted, in April 2007. The ALJ issued his decision on May 18, 2007. See generally ALJ Decision. As reflected in the decision, the District prevailed on three of the claims presented and the Student prevailed on portions of the remaining two claims. See ALJ Decision at 16. More specifically, the ALJ concluded that the District did not deny the Student a FAPE by (1) moving him from a special day class to a general education classroom without Ms. Hawkins's consent; (2) not timely producing his educational records to Ms. Hawkins and not producing his complete educational records, and (3) failing to provide Ms. Hawkins with a prior written notice regarding the change of his placement to a general education classroom, the failure to hold his annual IEP team meeting, and the failure to design an educational placement to meet his unique educational needs. The ALJ concluded that the District did deny the Student a FAPE by (1) failing to conduct his annual IEP by September 29, 2006, and for the six-week delay until the District scheduled the IEP team meeting on November 13, 2006, and (2) failing to provide speech and language therapy from the start of the 2006-2007 school year on August 31, 2006, until November 13, 2006, when the District was ready to conduct the IEP team meeting. The Student was awarded 22 hours of compensatory education. See ALJ Decision at 16. Subsequently, on August 16, 2007, Ms. Hawkins filed the instant lawsuit, challenging the ALJ's decision. See Docket No. 1 (complaint).

In its response to the complaint, the District asserted a counterclaim for attorney's fees. The counterclaim was not asserted against either Ms. Hawkins or the Student but rather against the law firm and attorney that had represented them, i.e., the Adams law firm and Jean Murrell Adams. The Adams law firm and Ms. Adams moved to dismiss the counterclaim, see Docket No. 22 (motion, filed on 11/21/2007), and the Court granted the motion with prejudice. See Docket No. 39 (order, filed on 3/11/2008).

In June 2008, the parties informed the Court through a joint case management statement that they were settling the case, leaving only the issue for attorney's fees for the Court's resolution. See Docket No. 49 (joint case management statement); see also Docket No. 51 (joint case management

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statement, filed on 7/30/2008). Under the settlement agreement, the District agreed to provide the Student with fifty hours of speech and language therapy and seventy-five hours of tutoring. See Settlement Agreement ¶ II.A. In addition, the District agreed "to conduct a psycho-educational assessment of [the] Student, which will include the NEPSY-II assessment instrument, to be conducted by a District psychologist who holds a Ph.D." Settlement Agreement ¶ II.A.

## **II. DISCUSSION**

### **A. Motions to Strike**

The District has moved to strike certain portions of Ms. Hawkins's motion for fees and costs. After the Court held a hearing on the motion, the District filed a supplemental motion

to strike portions of Ms. Hawkins's reply brief filed in support of the fee-and-cost motion. Ms. Hawkins moved to strike the supplemental motion.

The Court **DENIES** the supplemental motion to strike as untimely, which thereby moots Ms. Hawkins's motion to strike. The hearing on Ms. Hawkins's fee-and-cost motion was held on October 29, 2008. At the conclusion of the hearing, the Court deemed the matter submitted (with one exception – *i.e.*, permitting the District to file an additional case authority). The supplemental motion was not filed until some twelve days later. No reason was given as to why the supplemental motion to strike could not have been filed prior to the hearing on October 29. In any event, the Court is able to determine on its own whether – as the District argues in its supplemental motion to strike – claims made in the reply brief are supported by evidence.

As for the timely filed initial motion to strike, the Court rules as follows.

First, the District moves to strike those portions of the Adams and Garcia declarations that claim that the District engaged in "ongoing and egregious delays" during both the administrative proceeding and the federal litigation. The motion is **DENIED**. The attorney declarations provide specific examples of how the District allegedly delayed and constitutes admissible evidence.

Second, the District moves to strike Ms. Hawkins's references to the decision by the ALJ. The motion is **DENIED**. First, the decision is already part of the record because of Counterdefendants' motion to dismiss the District's counterclaim. See Docket No. 22, Ex. A (decision, attached to motion). Second, the District has made the decision part of the record now by **Page 5** asking the Court to take judicial notice of the ALJ's decision. See Def.'s RJN, Ex. C (ALJ decision).

Third, the District has moved to strike that part of the fee motion that discusses the settlement agreement between the parties. The motion is **DENIED**. Contrary to what the District argues, Ms. Hawkins is not relying on the settlement agreement in violation of Federal Rule of Evidence **408**. That is, she is not using the settlement agreement to prove the District's liability for the underlying IDEA claim. Moreover, as a practical matter, the Court must know the terms of the settlement agreement in order to determine whether, *e.g.*, Ms. Hawkins is the prevailing party, whether the results she obtained in the civil action were more favorable than the settlement offer made by the District, and whether there should be a fee reduction based on limited success – all defenses affirmatively raised by the District. Any claim that the settlement agreement cannot be considered has, at this juncture, been waived.

Fourth, the District has moved to strike that part of the fee motion that discusses the Student's placement. See Mot. at 6. The motion is **GRANTED**. As the District points out, there is no evidence to back up the claims regarding the Student's placement.

Finally, the District has moved to strike that part of the fee motion that mentions the District receiving, during the mediation, an itemized invoice from Ms. Hawkins regarding her attorney's fees (*i.e.*, \$7,500). The motion is **GRANTED**. As the District points out, the IDEA provides that "[d]iscussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding." **20 U.S.C. § 1415(e)(2)(B)**. Moreover, there is no evidence about the alleged \$7,500 invoice. The invoice is not mentioned in either attorney declaration. Granting the motion to strike will not harm Ms. Hawkins's case as she can still argue that the District's settlement offer, which included an attorney fee payment of \$500, was patently inadequate. For example, the Court can still look at the billing records and see that, by the date of the settlement offer, approximately \$9,000 had been "billed." See Adams Decl., Ex. A (billing records).

**Page 6****B. Statutory Fee-Shifting**

The IDEA contains a specific fee-shifting provision. It states in relevant part that, "[i]n any action or proceeding brought under this section [*i.e.*, [20 U.S.C. § 1415](#)], the court, in its discretion, may award reasonable attorneys' fees as part of the costs .^.^ to a prevailing party who is the parent of a child with a disability." [fn2] [20 U.S.C. § 1415](#)(i)(3)(B)(i)(I). There is no dispute that a prevailing parent may obtain fees incurred in the administrative proceeding as well as fees incurred in the civil action. See *A.R. v. N.Y. City Dep't of Educ.*, [407 F.3d 65, 75](#) (2d Cir. 2005) ("In the context of the IDEA, 'proceeding' refers to, or at least includes, an administrative proceeding."); *Lucht v. Molalla River Sch. Dist.*, [225 F.3d 1023, 1026](#) (9th Cir. 2000) ("The parties do not dispute that, under § 1415(i)(3)(B), prevailing parents can recover attorney fees that they expended in an impartial due process hearing.").

Under the IDEA, however, attorney's fees and related costs are prohibited for certain services. For example:

Attorney's fees and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if

- (I) the offer is made within the time prescribed by Rule [68](#) of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
- (II) the offer is not accepted within 10 days; and
- (III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

[20 U.S.C. § 1415](#)(i)(3)(D)(i). Notwithstanding the above, there is no prohibition on fees and costs if the parent "was substantially justified in rejecting the settlement offer." *Id.* § 1415(i)(3)(E).

In addition to the above, fees and costs may be reduced in certain circumstances. For example, fees and costs may be reduced if

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- (i) the parent, or the parent's attorney, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy;
- (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; [or]
- (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding.^.^.

*Id.* § 1415(i)(3)(F). However, no reduction may be made for any of the above reasons "if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section." *Id.* § 1415(i)(3)(G).

**C. Administrative Proceeding v. Civil Action**

As a preliminary matter, the Court takes note that the District

has opposed Ms. Hawkins's motion by posing – with one exception – separate and distinct challenges to the fees and costs incurred in the administrative proceeding and to the fees and costs incurred in the civil action.<sup>[fn3]</sup> In other words, the District has compartmentalized the administrative proceeding from the civil action.

The District appears to have done this in order to take advantage of some of the IDEA provisions that either prohibit or reduce attorney's fees and costs. For example, by compartmentalizing the administrative proceeding from the civil action, the District may focus on the poor results that Ms. Hawkins obtained at the administrative level (*i.e.*, only 22 hours of compensatory education for the Student). The results obtained at the administrative level are certainly less favorable than the settlement offer that the District made prior to the administrative hearing, *see* Rolan Decl., Ex. D (settlement offer) (offering 100 hours of compensatory education); therefore, the District may argue that fees and costs incurred after its settlement offer should be excluded pursuant to § 1415(i)(3)(D)(i). Moreover, the results obtained at the administrative level are far less favorable than the relief sought by Ms. Hawkins in her administrative complaint, *see* Def.'s RJN, Ex. A (administrative complaint) (asking for, *inter alia*, 300 hours of compensatory education), thus giving the District the opportunity to seek a reduction based on limited success

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pursuant to *Hensley v. Eckerhart*, [461 U.S. 424](#) (1983), and its progeny. Finally, by compartmentalizing the administrative proceeding from the civil action, the District may also argue that Ms. Hawkins was not the prevailing party in the civil action.

The District, however, has not provided any authority to support this approach. While there appears to be little case law directly on point, what little authority there is under the IDEA does not support such a compartmentalized approach. *See Troy Sch. Dist. v. Boutsikaris*, [317 F. Supp. 2d 788](#), [792](#), [795-96](#), [799-800](#) (E.D. Mich. 2004) (determining whether parents were the prevailing party based upon the results of the civil action only; also looking at the issue of parents' limited success based on the results of the civil action only; only looking at administrative proceeding and civil action separately to determine what reductions to fees and costs there should be based on the limited success of parents); *cf. M.L. v. Federal Way School District*, [401 F. Supp. 2d 1158](#), [1163-64](#) (W.D. Wash. 2005) (rejecting the plaintiff's argument that, in cases that start with an administrative proceeding and continue with a civil action, a settlement offer made before the administrative proceeding "is irrelevant and ought not to be compared against the judicial relief ultimately obtained by [the] [p]arents").

Logically, the District's approach makes little sense. In the context of other fee-shifting statutes, a party who lost at the trial level but obtained a dispositive reversal at the appellate level is often awarded fees for both phases of the case, not just that incurred in the appeal. *See, e.g., Farbotko v. Clinton County*, [433 F.3d 204](#), [206](#), [211](#) (2d Cir. 2005) (remanding for recalculation of fees by district court but not disputing district court's conclusion that prevailing party was entitled to fees incurred at trial level and on appeal); *cf. Capital Asset Research Corp. v. Finnegan*, [216 F.3d 1268](#), [1273](#) (11th Cir. 2000) (noting that, "as a practical matter, the identity of the prevailing party could not be ascertained until after the appeal"). Similarly, courts do not appear to compartmentalize the administrative proceeding from the civil action in the context of Title VII, which, like the IDEA, provides that fees and costs may be obtained for the administrative proceeding as well as the civil action. *See* [42 U.S.C. § 2000e-5\(k\)](#). *See generally New York Gaslight Club, Inc. v. Carey*, [447 U.S. 54](#), [65](#) (concluding that, in Title VII action, attorney's fees may be properly awarded for time spent before a state administrative agency).

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Finally, the IDEA's settlement offer provision clearly contemplates that results obtained would be measured by the relief "finally obtained" as determined by the final adjudication – either "the court" or "the administrative hearing officer" if no judicial appeal is taken. [20 U.S.C. § 1415\(i\)\(3\)\(D\)\(i\)](#).

Accordingly, in assessing such questions as prevailing party status, the Court will not compartmentalize and examine the administrative and judicial proceedings in isolation. Instead, such issues will be measured by the ultimate result.

#### D. Prevailing Party

The first issue for the Court is whether Ms. Hawkins is the prevailing party in the civil action. The parties' settlement agreement provides that "[n]othing in this agreement shall be deemed or construed to confer prevailing party status on either party, and, by entering into this agreement, neither party consents to prevailing party status within the meaning of *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, [532 U.S. 598](#), [600](#) (2001)." Settlement Agreement ¶ X. The Court construes this provision as simply reflecting the parties' agreement that the issue of attorney's fees was left for the Court to resolve and that the fact of settlement did not make Ms. Hawkins a prevailing party *per se*. In other words, this provision means the District does not waive its defenses and may assert, as it does here, that Ms. Hawkins is not the prevailing party because, *inter alia*, there is a lack of judicial imprimatur. Conversely, the provision does not constitute a stipulation by Ms. Hawkins that she is not a prevailing party; it does not waive Ms. Hawkins's right to argue, based on the facts of this case and the specific terms of the settlement agreement, that she is a prevailing party. It is undisputed that the parties contemplated that this Court would rule on the merits of the fee claim. The Court thus turns to the merits.

In *Buckhannon*, the Supreme Court addressed the issue of whether the phrase "prevailing party" "includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, [532 U.S. at 600](#). The Court concluded that the answer was no. In rejecting the catalyst theory, the Court explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the

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lawsuit, lacks the necessary judicial imprimatur on the change" in the legal relationship between the parties. *Id.* at 605. In so ruling, the Court defined the elements of prevailing party status, a predicate to fee recovery under most fee-shifting statutes.

Based on *Buckhannon*, the Ninth Circuit has held that, "in order to be considered a prevailing party .^.^., a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but that change must also be judicially sanctioned." *P.N. v. Seattle Sch. Dist.*, [474 F.3d 1165](#), [1171](#) (9th Cir. 2007) (internal quotation marks omitted).

In the instant case, it is clear that there has been a material alteration of the legal relationship of the parties. The settlement agreement entered into by the parties requires the District to provide compensatory education as described above as well as a psycho-educational assessment. See *Richard S. v. Department of Dev. Servs. of State of Cal.*, [317 F.3d 1080](#), [1087](#) (9th Cir. 2003) (stating that the "settlement agreement materially altered the legal relationship between the parties, because the defendants were required to do something directly benefitting the plaintiffs that they otherwise would not have had to do"). The District argues, however, that that change in the legal relationship between the parties has not been judicially

sanctioned – *i.e.*, there is no judicial imprimatur in the instant case – and therefore Ms. Hawkins is not the prevailing party. The Court does not agree.

A settlement agreement that does not contemplate any judicial enforcement may lack sufficient judicial imprimatur as required by *Buckhannon*. See *P.N.*, [474 F.3d at 1173](#); see also *Carbonell v. INS*, [429 F.3d 894, 899](#) (9th Cir. 2005) (noting that a litigant is a prevailing party where he or she has "entered into a legally enforceable settlement agreement"). But the Ninth Circuit has held that there is sufficient judicial imprimatur if the settlement agreement provides for a court's retention of jurisdiction to resolve the issue of attorney's fees and costs. See *Richard S.*, [317 F.3d at 1088](#) (stating that, "[t]hrough [the parties'] legally enforceable settlement agreement and the district court's retention of jurisdiction [to resolve the issue of fees and costs], plaintiffs obtained a judicial imprimatur that alters the legal relationship of the parties") (internal quotation marks omitted; emphasis added); *Barrios v. California Interscholastic Fed'n*, [277 F.3d 1128, 1134](#) n. 5 (9th Cir. 2002) (noting that "the parties, in their settlement, agreed that the district court would retain

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jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs"). In the instant case, the settlement agreement specifically provides for retention of this Court's jurisdiction to deal with fees and costs. It states as follows: "The parties agree that any claim they have for attorney's fees arising out of this matter will be submitted to the federal district court for the court's determination and ruling through the court's process for consideration of such claims." Settlement Agreement ¶ II.B.

Moreover, judicial imprimatur also obtains where the settlement agreement provides for the court to retain jurisdiction to enforce the terms of the settlement agreement itself. See *Jankey v. Poop Deck*, [537 F.3d 1122, 1130](#) (9th Cir. 2008) (concluding that there was a sufficient judicial imprimatur where the settlement agreement and the district court's order dismissing the case provided that the court would retain jurisdiction to enforce the agreement). In the case at bar, there is such a retention provision. The settlement agreement provides that, "[i]n the event an action [is] filed to enforce this Agreement, such action shall be maintained in Alameda County Superior Court or the United States Federal Court for the Northern District of California." Settlement Agreement ¶ XII.

The District protests that the above provision is not a retention provision and that it is merely a venue clause, but its arguments are not persuasive.

First, the District argues that the parties could not have contemplated retention of jurisdiction by this Court because the parties agreed to a dismissal with prejudice and, thus, a new action would have to be filed, a fact assertedly inconsistent with the retention of jurisdiction by this Court to enforce the agreement. The District, however, cites only state law authority to support its argument. See *Hagan Eng'g, Inc. v. Mills*, [115 Cal. App. 4th 1004](#) (2003). State law is not controlling here. In federal court, there may be a dismissal with prejudice pursuant to a settlement agreement and, at the same time, a retention of jurisdiction. See, e.g., *Jankey*, [537 F.3d at 1128-29](#) (noting that parties stipulated to dismissal with prejudice but that court retained jurisdiction over enforcement of the settlement agreement). Thus, there is no internal inconsistency.

Second, the operative effect of this provision exceeds that of a venue provision. It specifically states that an action for enforcement may be maintained in this Court. But for this

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provision, this Court would not be able to exercise jurisdiction over any alleged breach of the settlement agreement. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, [511 U.S. 375, 381-82](#) (1994)

(stating that, if a court does not embody a settlement agreement in its dismissal order or retain jurisdiction over the settlement agreement, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction"). In other words, absent the settlement agreement in this case, there would be no independent basis for federal jurisdiction. The settlement agreement thus operates to confer jurisdiction, not merely venue, upon this Court to enforce it. It thus provides sufficient judicial imprimatur to satisfy *Buckhannon* and its Ninth Circuit progeny.

To be sure, the language could have been drafted more clearly. But the operative effect of the provision is clear. In any event, even if the provision were deemed ambiguous, see *Dore v. Arnold Worldwide, Inc.*, [39 Cal.4th 384](#), [391](#) (2006) (stating that "[a]n ambiguity arises when language is reasonably susceptible of more than one application to material facts"), the Court may consider extrinsic evidence to determine the intent of the parties. See *Wolf v. Walt Disney Pictures & Television*, [162 Cal. App. 4th 1107](#), [1126](#) (2008) (stating that "[e]xtrinsic evidence is admissible . . . to interpret an agreement when a material term is ambiguous"). The extrinsic evidence here lends support to the Court's conclusion that the provision is about retention of jurisdiction rather than merely establishing venue. Ms. Adams states in her reply declaration that she had a conversation with Diane Rolan, counsel for the District about a stipulation for dismissal in this case. According to Ms. Adams, "I indicated that I would include a specific provision in the Stipulation making clear that this Court retains jurisdiction to enforce the Agreement. [Ms. Rolan] responded that she assumed Judge Chen would retain jurisdiction for the purpose of enforcing the agreement." Adams Reply Decl. ¶ 4. Ms. Rolan, in a declaration of her own, admits to "making an impromptu statement that I thought there was a clause in the settlement agreement regarding enforcement" but claims that she also told Ms. Adams that "Mr. Sturges would need to review the Stipulated Dismissal to see if it met with his approval." Rolan Decl. ¶ 7 (located at Docket No. 85). Even if Ms. Rolan told Ms. Adams that she needed Mr. Sturges final sign-off, it is telling that Ms. Rolan did not, at that time, outright object to Ms. Adams's statement that she would include a retention-of-jurisdiction

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provision. The fact that Ms. Rolan was not only counsel of record for the District but by her own admission participated in the drafting of the settlement agreement, see Rolan Decl. ¶ 2, underscores the problematic nature of her failure to even object to Ms. Adams's statement. In short, Ms. Rolan's behavior supports this Court's conclusion that, at the time of the settlement agreement, there was an understanding by the parties that the Court would retain jurisdiction for enforcement purposes.

Ms. Hawkins is therefore a prevailing party under the IDEA and, as the prevailing party, the Court, "in its discretion, may award [her] reasonable attorneys' fees as part of the costs."

[20 U.S.C. § 1415](#)(i)(3)(B)(i).

**E. Reasonable Hourly Rate**

The IDEA provides that attorney's fees and related costs that are awarded "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." *Id.* § 1415(i)(3)(C) (adding that "[n]o bonus or multiplier may be used"). It further provides that an award of fees and costs should be reduced when "the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of comparable skill, reputation, and experience." *Id.* § 1415(i)(3)(F)(ii).

In the instant case, Ms. Hawkins's attorneys are Ms. Adams and Ms. Garcia. According to Ms. Hawkins, an appropriate hourly rate for Ms. Adams is \$390 and an appropriate hourly rate for Ms. Garcia is \$280. See Mot. at 9. The District challenges both of

these hourly rates as unreasonable. According to the District, a more appropriate rate for Ms. Adams is \$275-300 because "the large bulk of her legal career [was] as an entertainment law/intellectual property attorney." Sturges Decl. ¶ 4. As for Ms. Garcia, the District contends that a more appropriate rate is \$175-200 because she is a fairly recent graduate from law school (J.D. obtained in 2005), see Garcia Decl. ¶ 12, and played "only a support or training role." Sturges Decl. ¶ 4.

1. No Reduction if Unreasonable Protraction by District

As a preliminary matter, the Court takes note that, under the IDEA, it may not reduce a fee award on the basis of an unreasonable hourly rate if it finds that the District "unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section."

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20 U.S.C. § 1415(i)(3)(G). Ms. Hawkins contends that the District did in fact unreasonably protract both the administrative proceeding as well as the civil action. See Adams Decl. ¶ 7; Garcia Decl. ¶ 6.

With respect to the administrative proceeding, Ms. Hawkins asserts that the District unreasonably protracted the proceeding by, e.g., failing to participate in an early resolution session within 15 days of the filing of the administrative complaint, seeking a continuance of the mediation, denying each allegation in the administrative complaint, and failing to make any concessions until the third day of the administrative hearing. See Adams Decl. ¶¶ 9-12; Garcia Decl. ¶¶ 6-9. These arguments are not persuasive.

For example, while the IDEA does contain a provision requiring an early resolution session within 15 days of the educational agency's receiving notice of the administrative complaint, the parent and the educational agency may agree to use the mediation process described in § 1415(e) instead.

20 U.S.C. § 1415(f)(1)(B)(i). It appears that there was a mediation in the instant case. See Adams Decl., Ex. A (billing records) (reflecting that a mediation took place on February 1, 2007).

As for the District's request for a continuance of the mediation, there is no evidence in the record that the request was not reasonable. The declarations from Ms. Hawkins's counsel simply state that, "[o]n December 8, 2006, District counsel requested a continuance of the December 12, 2006 mediation date. The mediation was thereby delayed until February 1, 2007." Adams Decl. ¶ 10; see also Garcia Decl. ¶ 6 (noting the same).

Finally, Ms. Hawkins argues that the District unreasonably protracted the administrative proceeding by denying each allegation in the administrative complaint and failing to make any concessions until the third day of the administrative hearing.<sup>[fn4]</sup> The concessions that were made by the District at the administrative hearing (implicitly in contravention of its earlier denial of Ms. Hawkins's allegations) were (1) "that Student's annual IEP was late, because it was due on September 29, 2006, but was not scheduled until November 13, 2006" and (2) "that it failed to provide Student with SLT from the start of the 2006-2007 SY." ALJ Decision at 3.

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The Court does not find unreasonable protraction on this basis because the history underlying the case was somewhat complicated (e.g., why the IEP meeting did not take place which the District contends was Ms. Hawkins's fault), and the administrative hearing may well have been the first real opportunity for the District to make its concessions, especially since, for several months, one of the District's main attorneys was ill with cancer and not available. See Garcia Decl. ¶ 7 (stating that, at a hearing in January 2007, counsel for the District requested that the administrative hearing be put off until early April 2007 because of the main attorney's illness). More important, the District's

concessions were limited and resolved only a very small part of the case. In essence, the District admitted wrongdoing for a six-week period only. Ms. Hawkins has not made any showing that, had the District made its concessions earlier, the administrative hearing would not have proceeded or that its scope would have been materially affected. Ms. Hawkins would still have argued, for example, that the Student was denied a FAPE after November 13, 2006 – her major argument.

Ms. Hawkins contends still that, regardless of what took place during the administrative proceeding, the District unreasonably protracted the civil action by filing a counterclaim against Ms. Adams in her individual capacity (in addition to her law firm). See Adams Decl. ¶ 13 ("[The District] filed a counter-claim against me in my personal capacity for no articulated reason."). She also claims that the District's refusal to settle the counterclaim unreasonably protracted the civil action. See Adams Decl. ¶ 13.

Ms. Hawkins's arguments are not persuasive. Simply because the District's counterclaim did not contain any "substantive allegations against [Ms. Adams] in her individual capacity," Docket No. 39 (Order at 14 n. 2), does not mean that the District had no reason to sue her in her individual capacity, particularly in light of the ALJ's decision and comments at the administrative hearing. See Def.'s RJN, Ex. B at 310-11 (administrative hearing transcript) (ALJ stating to Ms. Adams that he was troubled that "multiple allegations in the complaint are patently false"). As for the District's refusal to settle the counterclaim, the Court's order dismissing the counterclaim with prejudice reflected that the legal issues involved were not clear-cut. See Docket No. 39 (Order at 10-11 & n. 1) (noting that, in *Hensley*, the Supreme Court indicated in dicta that, "even where a plaintiff is partially successful, a defendant may still be able to recover fees on plaintiff's unsuccessful claims

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under [42 U.S.C. § 1988](#) if such claims are unrelated to the successful claims and are frivolous"; also noting that the Court had "found no case in which a court has applied the *dicta* .^.^ of *Hensley* and granted attorney's fees to a defendant in a split victory case"). The District's action did not constitute an unreasonable protraction of this action.

Accordingly, the Court finds that the District did not unreasonably protract the administrative proceeding and/or civil action. Thus, the District may challenge the requested hourly rates as unreasonable.

## 2. Ms. Adams

Ms. Adams received her J.D. in 1986. See Adams Decl. ¶ 22. Thus, she has been a lawyer for more than twenty years. Although Ms. Adams did not start her practice specializing in special education until October 2002, see Adams Decl. ¶ 30, prior to that date, she was involved in litigation, either as a litigator directly or as in-house litigation counsel. See Adams Decl. ¶¶ 24-28. Notably, Ms. Hawkins has offered declarations from other attorneys that support the requested hourly rate of \$390 in light of her experience. See Rosenbaum Decl. ¶ 11 ("Ms. Adams' rate of \$390 per hour also appears to be reasonable, given her years of experience."); Sanders Decl. ¶ 8 ("Based on my experience and personal knowledge of community rates for attorneys with the like skill and experience, I believe that Ms. Adams' hourly rate of \$390 falls within the prevailing rates in the community."); Loughrey Decl. ¶ 7 ("Ms. Adams' rate of \$390 per hour .^.^ appears to be reasonable given her experience."). The Court finds the requested hourly rate of \$390 reasonable for Ms. Adams.

## 3. Ms. Garcia

The hourly rate requested for Ms. Garcia – i.e., \$280 – is questionable. As noted above, Ms. Garcia obtained her J.D. in 2005. See Garcia Decl. ¶ 12. Thus, during the administrative

proceeding and the civil action, she was a junior attorney with only one to three years of experience. Notably, even one of the declarations offered by Ms. Hawkins in support of the hourly rate acknowledges that the \$280 hourly rate is higher than that for a person with similar years of experience. See Rosenbaum Decl. ¶ 11 ("Given my understanding of the typical fees charged in this area of law, Ms. Garcia's rate of \$280 per hour is slightly higher than the rates at which we would bill for an attorney

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with two years' experience."). Furthermore, another declaration submitted by Ms. Hawkins comes from a fifth-year attorney (a partner) at an East Bay law firm that specializes in special education litigation. That attorney currently charges a rate of \$300 per hour, only \$20 per hour more for an attorney with more than double Ms. Garcia's experience. This, too, suggests that the rate of \$280 is too high. See Loughrey Decl. ¶ 5 ("As a 5th year attorney, my full rate is \$300 per hour.").

Ms. Hawkins defends the hourly rate largely on the quantity of work that Ms. Garcia has done during those limited years, noting that she has "represented over seventy children in administrative cases and participated in two administrative hearings." Garcia Decl. ¶ 13. But quantity is a different matter from quality. There is no real evidence what Ms. Garcia's role was in those 70-plus cases. If, for example, she played only a minor role in the cases, then her experience would generally be similar to that of a typical junior attorney. Indeed, the only specific evidence about her experience establishes that (1) she participated in two administrative hearings (in what capacity is not clear), see Garcia Decl. ¶ 13, and (2) she "acted as lead counsel in [one] case filed against [the District] in late 2007 [which] settled in early 2008." Adams Reply Decl. ¶ 2. Notably, "[t]hat matter was resolved short of [an administrative] hearing.^.^.^." Adams Reply Decl. ¶ 2.

Taking into account the evidence that has been submitted, the Court concludes that an appropriate hourly rate for Ms. Garcia is \$250, a rate consistent with a third declaration Ms. Hawkins submitted. See Sanders Decl. ¶ 7 (stating that the rates of junior attorneys during her years at Adams Esq. ranged from \$250 to \$270); cf. *Pulido v. Rialto Unified Sch. Dist.*, No. EDCV 07-506-VAP (JCRx) (C.D. Cal. May 11, 2008) (Docket No. 31, at 10) (awarding \$255 per hour for a 2003 law graduate and a 2004 law graduate).

In so holding, the Court rejects the hourly rate suggested by the District – i.e., \$175-200. See Sturges Decl. ¶ 4. Contrary to what the District argues, Ms. Garcia was not involved in this particular case for purposes of support or training only. As reflected in the billing records, Ms. Garcia bore a significant amount of responsibility on the matter. Nor does the Court put much stock into the fact that counsel for the District charges only \$210 per hour for his services. See Sturges Decl. ¶ 3. As Ms. Hawkins points out, "hourly rates charged to government entity clients are not representative of the prevailing rates in the community since those rates are often pre-negotiated and

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reduced with the expectation of repeat business." Reply at 3 (citing *Pulido*, No. EDCV 07-506-VAP (JCRx) (Docket No. 31, at 10) (stating that "hourly rates charged to government entity clients are not representative of prevailing rates in a legal community, because those rates are often reduced with the expectation of repeat business") and *Trevino v. Gates*, [99 F.3d 911](#), [925](#) (9th Cir. 1996) (noting that "[p]rivate attorneys hired by a government entity to defend excessive force cases are not in the same legal market as private plaintiff's attorneys who litigate civil rights cases")).

Based on the billing records, it appears that Ms. Garcia billed 121.95 hours for the administrative proceeding and 96.01 hours for the civil action – i.e., a total of 217.96 hours. With an hourly rate of \$250 instead of \$280, the Court shall take a reduction of **\$6,538.80** from the fee request (i.e., 217.96 x \$30 = \$6,538.80).

#### 4. Paralegals and Legal Assistants

The District contends that the reasonable hourly rate for work done by nonattorneys in the Adams law firm should be zero. According to the District, Ms. Hawkins should not be compensated for the time spent by paralegals or legal assistants because there is no evidence that the individuals are paralegals or legal assistants under California law. See Opp'n at 20-21 (citing Cal. Bus. & Prof. Code § [6450\(c\)](#)).

The Court rejects this argument. The District has cited only one district court case stating that a nonattorney's time is compensable only if he or she holds certain certifications or meets certain qualifications under state law. See *I.S. v. Charter Oak Unified Sch. Dist.*, No. CV 05-1427 DSF (RCx) (Docket No. 76). More important, in *Missouri v. Jenkins*, [491 U.S. 274](#) (1989), the U.S. Supreme Court indicated that the phrase "reasonable attorney's fee" as used in [42 U.S.C. § 1988](#) included not only the work of attorneys but also paraprofessionals and other personnel, including "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client." *Id.* at 285. The Supreme Court went on to say that the work of such persons should be compensated in the same way that it is compensated in the relevant market, as measured by the practice of comparable private attorneys in the local community. See *id.* at 287 ("[I]f the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully

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compensatory if the court refused to compensate hours billed by paralegals or did so only at `cost.'").

In the instant case, Ms. Hawkins has not – as the District points out – provided any specific evidence about what the practice is in the local community. See Adams Reply Decl. ¶ 5 (simply stating that "[o]ur Terms of Engagement with Ms. Hawkins specifically calls for payment of law clerk, paralegal and legal assistant services and sets forth the hourly rate of such fees"). However, from the Court's own experience, the prevailing practice in the local community is to bill paraprofessional time separately at market rates. See also *Jenkins*, [491 U.S. at 289](#) (noting that "separate billing appears to be the practice in most communities today"). In other words, the cost of paraprofessionals is not usually absorbed as part of the office overhead reflected in the attorney's billing rate. Accordingly, the Court shall compensate Ms. Hawkins for the time billed by the nonattorneys in the Adams law firm. The Court notes the District did not challenge the rates per se charged by the nonattorneys. It only argued that their fees should not be included at all. The rates of the paralegals and legal assistants, ranging from \$140 to \$190, were therefore not specifically contested by the District.

#### F. Reasonable Number of Hours

The District challenges not only the hourly rates requested by Ms. Hawkins as unreasonable but also the number of hours. Under the IDEA, an award of fees and costs should be reduced when "the time spent and legal services furnished were excessive considering the nature of the action or proceeding." [20 U.S.C. § 1415](#)(i)(3)(F)(iii).

The District challenges the billing records of Ms. Hawkins's attorneys on several grounds. First, the District contends that there was inappropriate billing for clerical tasks. Second, the District argues that the billing records are problematic because many of the entries are vague. Finally, the District argues that the number of hours billed is excessive because multiple attorneys (*i.e.*, both Ms. Adams and Ms. Garcia) worked on the same task.

## 1. Billing Judgment

Before discussing the specific arguments raised by the District, the Court addresses first the issue of billing judgment. The Supreme Court has noted that

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[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.^.^. "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."

*Hensley*, [461 U.S. at 434](#).

In the instant case, Ms. Hawkins contends that her attorneys did exercise billing judgment. In her declaration, Ms. Adams claims that, "[i]n recording my time, I have not recorded, and we do not seek, compensation for many tasks and activities. My records for work in this case do not include many telephone conversations, meetings, and emails. Therefore, the actual time I spent on the instant case is more than the time shown on my hourly records." Adams Decl. ¶ 17. Ms. Garcia makes the same claim in her declaration. See Garcia Decl. ¶ 10.

However, neither Ms. Adams nor Ms. Garcia attempts to quantify the charges that allegedly were excluded. It is thus difficult for the Court to conclude that billing judgment was in fact exercised, or even properly exercised, as claimed. *Cf.* Schwartz & Kirklin, 2 Section 1983 Litigation, Statutory Attorney's Fees § 4.13, at 219-20 (3d ed. 1997) (advising attorneys "to maintain contemporaneous time records of all of the time expended in the case and to identify in their fee application not only the hours for which they seek compensation but also the particular hours for which they have chosen, in the exercise of billing judgment, not to seek compensation") (emphasis in original).

This problem is compounded by the fact that the billing records do reflect "no charges" for work done by paralegals or legal assistants. It is not clear why it was the practice to account for "no charges" by paralegals and legal assistants, but not the attorneys.

Finally, even for the "no charges" by paralegals and legal assistants, it is questionable whether billing judgment was used since, for the most part, there were "no charges" for work done at the outset of the case only, *i.e.*, early on in the administrative process. See Adams Decl., Ex. A (billing records) (reflecting that last "no charge" was dated January 31, 2007, prior to mediation). With very limited exceptions, there were no "no charges" during the civil action at all. See Adams

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Reply Decl., Ex. B (supplemental billing records) (reflecting "no charges" for work that was done on September 25, 2008).

Thus, for the reasons stated above, the claim of billing judgment in the instant case is questionable. The failure to adequately document billing judgment contributes to the 10% reduction discussed below.

## 2. Clerical Tasks

According to the District, some of the work that was billed by Ms. Hawkins's attorneys and/or their supporting staff was entirely clerical in nature. The Supreme Court has stated that "purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Jenkins*, [491 U.S. at 288](#). Based on the Court's review of the billing records, there were some clerical tasks that were performed by the paralegals and/or legal assistants but not much. See Adams Decl., Ex. A (on August 23, 2007, retrieving and forwarding a message –

0.10 hours for a total of \$16; September 21, 2007, retrieving and forwarding a message – 0.10 hours for a total of \$16; and on September 15, 2008, e-filing – 0.40 hours for a total of \$56); Adams Reply Decl., Ex. B (on October 3, 2008, mailing – 0.20 hours for a total of \$28).<sup>[fn5]</sup> These hours shall be excluded. Thus, there shall a reduction of \$116 from the fee award.

### 3. Vague

The District argues next that Ms. Hawkins has failed to meet her burden of adequately documenting the hours expended on the case because many of the time entries are too vague. According to the District, greater specificity could have been provided for many of the entries in the instant case – e.g., specifying what legal research was done, what the subject matter of a telephone call was, and so forth.

Under Ninth Circuit law, an attorney "is not required to record in great detail how each minute of his time was expended." *Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004). Rather, an attorney need only "identify the general subject matter of his time expenditures." *Trustees of Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.2d 415, 427 (9th Cir. 2000). Even

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under this liberal standard, the time entries identified by the District are problematic. Without more specificity about, e.g., what legal research was done or the subject matter of a call, it is difficult for both the District and the Court to evaluate whether the work done was excessive, duplicative, or otherwise unnecessary. See *Hensley*, 461 U.S. at 434. Another example of problematic vague entries are those that simply state "[p]rocessing client documents" or something similar. See, e.g., entries on: January 20, 2008 (5.50 hours); February 16, 2008 (0.25 hours); July 25, 2008 (0.03 hours); July 30, 2008 (0.30 hours); September 15, 2008 (0.10 hours); September 24, 2008 (0.08 and 0.10 hours); September 25, 2008 (0.30 hours); October 9, 2008 (0.50 hours); and October 15, 2008 (0.10 and 0.20 hours). See Adams Decl., Ex. A (billing records); Adams Reply Decl., Ex. B (supplemental billing records). The vagueness of these entries is problematic because processing documents could well be a clerical task for which there should not be compensation. See Part II.F.2, *infra*.

Ms. Hawkins does not have any real defense for the lack of specificity in the time records. She simply states that, because "attorney billing in special education cases must walk a fine line as bills are customarily disclosed to opposing counsel during the settlement process prior to the conclusion of a case," "[i]t would .^.^ violate the attorney/client privilege against disclosure if counsel were to provide the level of detail that the District now demands." Reply at 4. This excuse is insufficient. There is no reason why more detailed records would not have been maintained and then redacted for production to opposing counsel if necessary to preserve privileged matters.

Thus, arguably, the Court should take an across-the-board reduction from the fee award based on the vagueness problem. Some courts have taken this very approach. See, e.g., *Tennessee Gas Pipeline v. 104 Acres of Land*, 32 F.3d 632, 634 (1st Cir. 1994) (in case involving fee request pursuant to 42 U.S.C. § 4654, affirming district court's reduction of fees by 30% because, *inter alia*, time entries had descriptions such as "confer with co-counsel," "confer with client," "review materials," "review documents," and "legal research" without any indication of subject matter involved; this made it "impossible for the court to gage whether the task performed was warranted .^.^ [and] to determine if the time factor allocated was appropriate or excessive"), *superseded by statute on other grounds*, *Cohen v. Brown Univ.*, R.I. C.A. No. 92-197, N.H. C.A. No. 99-485-B, 2003 U.S.

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Dist. LEXIS 12512 (D.R.I. Mar. 31, 2003); *Gonzalez v. Town of*

*Stratford*, [830 F. Supp. 111](#), [114](#) (D. Conn. 1992) (reducing fee award by 10% because "some of the entries are too vague to enable the court to consider whether the time was reasonably spent" – e.g., some time entries simply said that an attorney performed "research" or had a "telephone conference" without specifying the issue researched or the subject of the telephone conference). In the instant case, the Court factors the vagueness of the records in taking a 10% across-the-board deduction discussed below.

#### 4. Multiple Attorneys for Same Task

Finally, the District asserts that there should also be a reduction in the number of hours because of duplication – i.e., multiple attorneys unreasonably performed the same task. This argument is not without some merit. There was a substantial number of hours billed in this case (more than 400 hours total), even though the case was not overly complex, which suggests that there was likely some duplication of effort or at least that the number of the hours was excessive. Unfortunately, the Court's ability to assess duplication and/or excessiveness is somewhat hampered by the vagueness in some of the time entries.

The Court does make some observations from what it can glean from the records. According to the District, the Court should make a specific deduction to address the fact that both Ms. Adams and Ms. Garcia appeared at the administrative proceeding. According to the District, Ms. Garcia's presence there was largely for purposes of training. The Court does not find this argument persuasive. The billing records reflect that a substantial part of the work done on the case was performed by Ms. Garcia; thus, her presence at the proceeding was reasonable.

However, it is not clear why multiple attorneys were needed, e.g., at the settlement conferences in the federal lawsuit. There is no real reason why both Ms. Adams and Ms. Garcia needed to be present. Indeed, that Ms. Garcia was competent to attend the settlement conferences alone is demonstrated by the fact that she appears to have attended the administrative mediation alone (February 8, 2007) and also conducted the pretrial conference for the administrative proceeding on her own (March 19, 2007). See Adams Decl., Ex. A (billing records). Similarly, it is not clear why multiple attorneys were needed at the initial case management conference on November 21, 2007. In sum, although the Court does not agree that there was a duplication of effort

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with respect to the administrative hearing, there does appear to be some inefficiencies here based on the total number of hours spent, along with the fact that certain duplication of effort is apparent even from the relatively vague entries.

Combined with counsel's failure to adequately document billing judgment and the problems caused by nonspecific entries, the Court shall take a 10% across-the-board deduction to account for these problems – a deduction well within this Court's discretion. See *Moreno v. City of Sacramento*, [534 F.3d 1106](#), [1112](#) (9th Cir. 2008) (stating that "the district court can impose a small reduction, no greater than 10 percent – a 'haircut' – based on its exercise of discretion and without a more specific explanation" as to which fees it thought were duplicative).

The Court shall calculate the 10% deduction in Part II.J, *infra*, i.e., after taking into account all specific exclusions that should be made. This shall ensure that there is no "double-counting" against Ms. Hawkins.

#### 5. Miscellany

In addition to the above deductions, the Court shall take further deductions based on the following.

First, as noted above, in *Hensley*, the Supreme Court noted that billing judgment means that hours not properly billed to one's client are not properly billed to one's adversary. See *Hensley*,

**461 U.S. at 434.** It appears that, in the instant case, the Adams law firm billed for doing bill review. One would not expect a lawyer to charge her client for such a task. See Adams Decl., Ex. A (on January 31, 2007, 0.30 hours for a total of \$42, and on September 24, 2008, 0.50 hours for a total of \$195). This shall not be included in the fee award – *i.e.*, there shall be a reduction of **\$237**.

Second, there appear to be two mistakes made on the billing records.

(1) Ms. Adams billed twice for appearing at the motion to dismiss the District's counterclaim. See Adams Decl., Ex. A (8.00 hours on February 13, 2008, the actual day of the hearing, and 8.00 hours on February 14, 2008, the day following the hearing). Therefore, there shall be a reduction of 8.00 hours at Ms. Adams's rate – *i.e.*, **\$3,120**.

(2) In the supplemental request for fees, see Adams Reply Decl., Ex. B, Ms. Hawkins asks for fees incurred on September 24, 2008. But those fees were already accounted for in the

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opening motion. Also, as reflected in the Adams reply declaration, Ms. Hawkins's attorney apparently decided not to charge her client for one of the time entries for September 24, 2008. Therefore, there should be a total reduction of **\$727.20** (representing 1.98 hours) See generally Adams Reply Decl., Ex. B.

Finally, in her reply brief, Ms. Hawkins asks to be compensated for fees that she expects she will incur but has not incurred yet – *i.e.*, time spent on a motion to dismiss since the District will not sign a stipulation of dismissal. See Adams Reply Decl., Ex. B (estimating that 3.50 hours will be spent on a motion to dismiss and 1.80 hours on a reply brief – both at Ms. Adams's rate). Ms. Hawkins has now filed the motion to dismiss but it should not have taken 3.50 hours to prepare; the motion consists of only one paragraph. Likewise, the time needed for the reply brief should not have been substantial either, as it consists of, in essence, only two pages. Accordingly, the Court shall make a deduction of 3.00 hours – *i.e.*, there shall be a reduction of **\$1,170** from the fee award (*i.e.*,  $3.00 \times \$390 = \$1,170$ ).

#### G. Fees Related to Counterclaim

Although the District does not argue that the fees incurred with respect to litigation over the District's counterclaim were excessive, it argues that they should still be excluded for two reasons: (1) because Ms. Hawkins was not a party to the counterclaim and (2) because the District's counterclaim was not frivolous.

The Court agrees with the District that attorney time spent defending the counterclaim should be excluded. As noted above, the District asserted a counterclaim against the Adams law firm and Ms. Adams, not Ms. Hawkins herself. A motion to dismiss the counterclaim was brought by the law firm and the attorney, see Docket No. 22 (motion), which the Court ultimately granted. See Docket No. 39 (order). Thus, the prevailing party with respect to the counterclaim was not Ms. Hawkins but rather the Adams law firm and Ms. Adams. As the District argues, the IDEA only provides for fees to be awarded to a prevailing "parent" or to a prevailing "educational agency." See **20 U.S.C. § 1415**(i)(3)(B)(i). The statute says nothing about awarding fees to a prevailing attorney of a parent. That Congress could have included such a provision is evident from the fact that the IDEA allows an educational agency to seek fees against the attorney of a parent – *e.g.*, because the

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complaint is frivolous. See *id.* § 1415(i)(3)(B)(i)(II). Where Congress intended to implicate the parent's attorney into the fee statute, it did. Thus, the absence of a provision shifting fees in favor of the prevailing attorney of a parent is telling. The text of the statute is dispositive.

In her reply brief, Ms. Hawkins argues that the fees related to the counterclaim should still be included because Ms. Hawkins "remained financially responsible for the payment of the legal fees in [the] defense [of the Adams law firm and Ms. Adams]."

Reply at 7. But there is no evidence of such to support this claim. Simply because the billing records include the time spent on the counterclaim does not mean that Ms. Hawkins was financially responsible for payment of these fees. Ms. Hawkins represented at the hearing that the engagement letter specified that she would be responsible for any fees incurred in connection with the case. But the engagement letter is not in evidence. The only evidence before the Court regarding the terms of the engagement is that Ms. Hawkins had to pay only a \$1 retainer fee to obtain the law firm's services and that the rest was on contingency with the Adams law firm bearing the risk of the litigation. See Adams Decl. ¶ 4 ("Our clients pay \$1 to retain our services and we depend upon the school districts to pay our fees if – and only if – we are successful in the case.").

At the hearing, Ms. Hawkins made an additional argument that, even though she had no express authority under the IDEA to support her claim that the fees incurred by her counsel for their own defense, as a matter of policy, they should be awarded. Otherwise, an educational agency could effectively harass or chill a parent from vindicating her rights under the statute by suing her attorneys without risk of liability should the educational agency lose such claims. This tactic could chill and deter IDEA suits because attorneys would not be willing to represent parents if they could be sued based on their representation of the parents. The Court is sympathetic to Ms. Hawkins's concern. Such suits could well have an unwarranted chilling effect. Cf. *Taus v. Loftus*, [40 Cal. 4th 683](#), [690](#) & n. 1 (2007) (noting that California legislature enacted certain statutes in response to SLAPPs – i.e., strategic lawsuits against public participation – in particular, "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances"). However, as noted above, this issue is governed by the express

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language of the IDEA. This policy concern must be addressed to Congress given the clarity of the current statute.

Moreover, the Court notes the attorney of a parent wrongfully sued by an educational agency is not without a remedy if an educational agency brings a frivolous suit against the attorney. For example, the parent or attorney might seek fees by asking the presiding judge to issue sanctions pursuant to its inherent authority. The parent or attorney could also seek monetary sanctions by motion pursuant to Federal Rule of Civil Procedure [11](#) or [28 U.S.C. § 1927](#).<sup>[fn6]</sup>

Accordingly, the Court excludes the following fees from the award.

9/23/2007	LMG	Legal research re counterclaim issues	2.6	\$650 <sup>[fn7]</sup>
11/15/2007	LMG	Legal research re atty fees	2	\$500
11/16/2007	JMA	Preparation of Meet and confer follow-up letter and begin drafting motion to dismiss	1.7	\$646
11/16/2007	JMA	Strategy sessions with potential counsel re District's counter claim	2.8	\$1,064
11/16/2007	LMG	Legal research re Motion to dismiss	2	\$500
11/17/2007	JMA	Legal research and preparation of answer and motion	2.9	\$1,102
11/18/2007	LMG	Draft Motion to Dismiss	4	\$1,000
11/19/2007	JMA	Review and revise motion to dismiss including legal research	3.4	\$1,292

and consultation with outside  
counsel

11/19/2007	JMA	Review and Revise Motion to Dismiss	3	\$840
<b>Page 28</b>				
11/20/2007	LMG	Cont'd revisions – M. to Dismiss	1	\$250
11/21/2007	VRA	Research re Memo of Pts and Auth	1.25	\$212.50
11/27/2007	JXP	Comm. w/JMA re: motion to dismiss; calendar date	0.1	\$16
1/03/2008	LMG	Draft letter to P. Sturges re Opp error	0.2	\$50
1/03/2008	LMG	Review and analyze D Rolan dec	1.5	\$375
1/04/2008	JMA	Review district opp to motion to dismiss and confer w/LMG re deficiency	1.5	\$585
1/04/2008	LMG	T/c w/P. Sturges re continuance	0.1	\$25
1/04/2008	LMG	Review and analyze Opposition	2	\$500
1/04/2008	LMG	Retrieve email from R. Bohannon re Opp	0.2	\$50
1/07/2008	LMG	Draft Continuance Stipulation	0.5	\$125
1/07/2008	LMG	T/c w/P. Sturges re continuance (2x)	0.1	\$25
1/07/2008	LMG	File Stip w/Court	0.5	\$125
1/08/2008	LMG	Draft, review and revise Stip for record seal	2	\$500
1/08/2008	LMG	T/c w/EMC clerk re continuance	0.1	\$25
1/10/2008	LMG	Review Order re continuance	0.2	\$50
1/17/2008	LMG	Legal Research re Motion to Dismiss	2.5	\$625
1/18/2008	JMA	Strategy session re: motion to dismiss and note re same	0.8	\$312
1/18/2008	LMG	Legal Research re Motion to Dismiss – Reply	3	\$750
1/18/2008	LMG	Strategy session re Motion to Dismiss & Settlement Conf. Stmt.	0.8	\$200
1/21/2008	LMG	Draft Reply to Dist Opp to Motion to Dismiss	5	\$1,250
1/22/2008	LMG	Review and revise Reply to Opp	3.5	\$875
1/25/2008	LMG	Cont'd revisions Reply	1	\$250
1/25/2008	LMG	Email corr. w/J. Briggs re: dismissal motion	0.1	\$25
<b>Page 29</b>				
1/28/2008	JMA	Review and revise reply brief and teleconference w/LMG re same	0.8	\$312
1/28/2008	LMG	Finalize and E-file Reply brief	1.5	\$375
2/12/2008	JMA	Review case file and supplemental legal research re: motion to	6	\$2,340

		dismiss		
2/12/2008	LMG	Strategy session w/JMA re hearing, upload docs and t/c re Parent re same	1	\$250
2/13/2008	JMA	Prepare for, travel to and attend hearing re: motion to dismiss	8	\$3,120
2/13/2008	JMA	Research and prepare letter to district re case filing against JMA	2.5	\$975
2/13/2008	LMG	Travel to and attend Hearing re: Motion to Dismiss	2.5	\$625
3/11/2008	JMA	Rec'v order re motion to dismiss and communication to client and LMG re same	0.6	\$234
3/11/2008	LMG	Retrieve, review and analyze Order re Motion to Dismiss	1	\$250
<b>TOTAL</b>			<b>76.25</b>	<b>\$23,275.50</b>

[fn7] For Ms. Garcia, the Court applies the \$250 hourly rate instead of the \$280 hourly rate because the Court has already made a reduction above to account for the excessive \$280 hourly rate.

#### H. Settlement Offer

In addition to contesting the reasonableness of the hourly rates and the number of hours, the District contends that any fees that were incurred after it made its settlement offer on March 23, 2007, *i.e.*, prior to the administrative hearing, should be excluded.

As noted above, pursuant to the IDEA,

[a]ttorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by Rule [68](#) of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

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(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

[20 U.S.C. § 1415](#)(i)(3)(D)(i).

In the instant case, it is undisputed that a settlement offer was made by the District. See Rolen Decl., Ex. D (settlement offer letter, dated 3/23/2007). However, it appears that the settlement offer was not timely made pursuant to § 1415(i)(3)(D)(i). As the provision above reflects, the settlement offer must be made "more than 10 days before the proceeding begins." [20 U.S.C. § 1415](#)(i)(3)(D)(i). Here, the record reflects that the administrative proceeding began on April 2, 2007. See ALJ Decision at 1. The settlement offer by the District was not made until March 23, 2007 – *i.e.*, exactly 10 days before the administrative proceeding. See *N.J. v. Northwest R-1 Sch. Dist.*, No. 4:04CV857 RWS, 2005 U.S. Dist. LEXIS 24673, at \*32 (E.D. Mo. Oct. 24, 2005) (noting that settlement offer was made exactly 10 days before the administrative proceeding, and not more than 10 days as required by the statute).

While the settlement offer appears to have been untimely under the IDEA, the Court shall still address the merits of the District's argument, particularly since Ms. Hawkins has not contested the timeliness of the offer. The Court therefore examines whether the relief finally obtained by Ms. Hawkins was more favorable than the offer of settlement.

According to the District, Ms. Hawkins should be barred from receiving fees incurred after it made its settlement offer in March 2007 because the relief she obtained at the administrative level – *i.e.*, 22 hours of compensatory education for the Student – was less favorable than the terms of the District's settlement offer. In its March 2007 settlement offer, the District offered to provide the Student with 100 hours of compensatory education (*i.e.*, 40 hours of speech and language and 60 hours of educational therapy), as well as four weeks at a special summer camp, and further offered to convene the triennial and annual IEP for the Student within a certain time. In addition, the District offered to pay \$500 in attorney's fees to Ms. Hawkins. See Rolan Decl., Ex. D (settlement offer letter).

If the Court were required to compare the results of the administrative proceeding with the settlement offer, there would be little dispute that Ms. Hawkins obtained less favorable relief.

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However, as discussed above, the proper comparison is the ultimate result of the civil action (*i.e.*, the final settlement agreement which received the imprimatur of the Court sufficient to confer prevailing party status) with the settlement offer. See Part II.D., *supra*.

With this as the proper point of comparison, the Court cannot conclude that the results of the civil action were less favorable than the settlement offered by the District. Ms. Hawkins obtained more compensatory education for the Student under the settlement agreement (125 hours of compensatory education) compared to the settlement offer (100 hours). Although the settlement offer also included four weeks at a special summer camp, the settlement agreement provided for a "a full assessment including the neurological testing recommended by [Ms. Hawkins's] consultant at the administrative hearing." Mot. at 4.

To be sure, the difference between the kinds of relief obtained and offered is like comparing apples and oranges, and so there is some difficulty in evaluating whether this aspect of the settlement agreement was more or less favorable. Therefore, the Court must determine who bears the burden of proof – *i.e.*, is it the District's burden to show that the agreement was less favorable or Mr. Hawkins's burden to show that the agreement was more favorable? In the context of Rule 68, courts have held that it is the burden on the defendant to show that the settlement offer was more favorable than the judgment. See *Reiter v. MTA N.Y. City Transit Auth.*, [457 F.3d 224](#), [231](#) (2d Cir. 2005) (stating that, "[i]n determining the value of the relief, the defendant bears the burden of showing that the Rule 68 offer was more favorable than the judgment"); *Milton v. Rosicki, Rosicki & Assocs., P.C.*, No. 02 CV 3052 (NG), 2007 U.S. Dist. LEXIS 56872, at \*8-9 (E.D.N.Y. Aug. 3, 2007) (noting the same); *Jankey v. Beach Hut*, CV 05-3856 SVW (JTLx), 2006 U.S. Dist. LEXIS 96365, at \*23 (C.D. Cal. Dec. 19, 2006) (noting the same). As explained in one legal treatise, it is often difficult to compare nonmonetary forms of relief but,

[a]s a guiding principle .^.^., it would be best to view the defendant as having the burden of demonstrating that the offer was superior. Although it is true that the rule itself makes the cost-shifting consequences apply unless the judgment is more favorable, suggesting that the burden to show that the judgment is more favorable should be on the plaintiff, that wording assumes the comparison is not difficult to make. Rule 68 is actually a tool for defendant to use,

and defendant alone determines the provisions of the offer. Since defendant has drafted those provisions, the courts generally interpret the offer against

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defendant. Consistent with that, the burden should be on defendant to demonstrate that those provisions are in fact more favorable than what plaintiff obtained by judgment.

*Wright, et al.*, 12 Fed. Prac. & Proc. Civ. 2d § 3006.1. The settlement offer provision in the IDEA is modeled on Rule 68, and therefore the Court concludes that the burden is on the District, as the defendant in the case, to show that the settlement agreement was less favorable. In light of the discussion above, the District has failed to meet that burden.[\[fn8\]](#)

Even if the Court were inclined to find the results of the civil action less favorable than the settlement offer, the District still would not prevail on this issue because, "[n]otwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is a prevailing party and who was substantially justified in rejecting the settlement offer." [20 U.S.C. § 1415\(i\)\(3\)\(E\)](#). As Ms. Hawkins contends, she was substantially justified in rejecting the settlement offer because it included only \$500 in attorney's fees. However, as previously noted, by the date of the settlement offer, Ms. Hawkins's attorneys had incurred over \$9,000 in fees. Acceptance of the offer would have required Ms. Hawkins to waive her fee claim for \$500. Her rejection was thus substantially justified. *Cf. B.L. v. District of Columbia*, 517 F. Supp. 2d 57, 61 (D.D.C. 2007) (concluding that "two plaintiffs, F.M. and A.B., were substantially justified in rejecting the settlement terms, which offered only a small percentage of their claimed expert costs").

Defendants contend that Ms. Hawkins's substantial justification argument must be rejected because (1) Ms. Hawkins had "no reasonable basis to expect that she would recover attorney fees" given her conduct, including the assertion of "meritless and false claims"; (2) attorney's fees were "so utterly speculative at the ten day offer juncture that it would be impossible to determine whether any offer in this regard would be favorable to plaintiff"; and (3) attorney's fees should not be a consideration since "the intent of the ten day offer statute is to foster resolution and obtain

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appropriate services for a student without the need for a hearing, not to ensure payment of attorney fees." *Opp'n* at 15-16. None of these arguments has merit.

First, Ms. Hawkins had a reasonable basis to expect that she would recover at least some fees, as even the District ultimately conceded that it did not hold the IEP meeting on time and should have provided some speech and language therapy. As noted above, a prevailing parent is entitled to reasonable attorney's fees for administrative proceedings under the IDEA. These fees in this case would certainly be more than \$500, a nominal sum. Second, attorney's fees were not completely speculative at the time of the settlement offer as it appears that Ms. Hawkins's attorneys kept contemporaneous billing records. See *Adams Decl.* ¶ 17 ("Our method of recording attorneys' fees consists of recording time spent on particular cases as contemporaneously as possible with the actual expenditure of time."). And as noted above, fees incurred in administrative proceedings may be awarded under the IDEA. Finally, the District has cited no authority for its claim that the purpose of the ten-day-offer statute should bar a fee award. Even assuming that the purpose is to encourage settlement and avoid protracted litigation (a fair assumption), *cf. Fed.R.Civ.P. 68*, 1946 advisory committee notes (indicating that is the purpose behind Rule 68 offers), it is not unreasonable for a party to consider the adequacy of attorney's fees offered as a factor in deciding whether to accept where there is a basis for fee-shifting. Notably, under Rule 68, after which

§ 1415(i)(3)(D)(i) is modeled, a settlement offer must include an offer of "costs then accrued," Fed.R.Civ.P. 68(a), which includes statutory attorney's fees where the statute authorizes fees as part of costs. See *Mannick v. Kaiser Found. Health Plan, Inc.*, No. C 03-5905 PJH, 2007 WL 2892647, at \*9 (N.D. Cal. Sept. 28, 2007).

#### I. Unreasonable Protraction

The District argues that, even if a reduction based on its settlement offer is not appropriate, there should still be a reduction because Ms. Hawkins and/or her attorneys "unreasonably protracted the final resolution of the controversy." [20 U.S.C. § 1415\(i\)\(3\)\(F\)\(i\)](#). This argument may be considered since the Court has rejected Ms. Hawkins's contention that the District also unreasonably protracted the final resolution of the case. See *id.* § 1415(i)(3)(G) ("The provisions of

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subparagraph (F) shall not apply in any action or proceeding if the State or local educational agency unreasonably protracted the final resolution of the action or proceeding.^.^.").

The District's contention that Ms. Hawkins and/or her attorneys unreasonably protracted the final resolution of the controversy is based in large part on findings that were made by the ALJ in the administrative proceeding. For example, the ALJ found that

[t]he District was ready to conduct Student's IEP team meeting no later than Monday, November 13, 2006, which is about six weeks after the IEP team meeting was due. However, Mother unreasonably refused to attend an IEP meeting, and Mother's attorney unreasonably insisted that any IEP team meeting must be held after mediation.

ALJ Decision at 5. In addition, the ALJ found that the due process complaint "contains at least four demonstrably false allegations." ALJ Decision at 10.

The District also argues that the final resolution of the controversy was unreasonably protracted because of conduct by Ms. Hawkins's counsel during the administrative proceeding – e.g., providing a written expert report that was clearly untimely, falsely accusing the District of refusing to produce witnesses, falsely accusing the District of not producing a document, and filing a meritless motion to exclude all of the District's exhibits. See Opp'n at 4-6.

The District's arguments have merit. With respect to the ALJ findings, the Ninth Circuit has noted that, under the IDEA, a "court may give less than the usual deference to the administrative hearing officer's findings of fact" but those findings still must be accorded "due weight." *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008), available at 2008 U.S. App. LEXIS 18865, at \*22-23. Due weight means that "[t]he court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole." *Id.* at \*23. "Although the district court is free to determine independently how much weight to give the administrative findings' the courts are not permitted simply to ignore [them]. A district court shall accord more deference to administrative agency findings that it considers thorough and careful." *L.M. v. Capistrano Unified Sch. Dist.*, [538 F.3d 1261](#) (9th Cir. 2008), available at 2008 U.S. App. LEXIS 17634, at \*13; see also *Van Duyn v. Baker* **Page 35** *Sch. Dist.*, [502 F.3d 811](#), [817](#) (9th Cir. 2007) (cautioning that "courts must not substitute their own notions of sound educational policy for those of the school authorities which they review").

As noted above, in the instant case, the ALJ made two findings

that are relevant here: (1) that Ms. Hawkins and her counsel unreasonably delayed the IEP meeting and (2) that the administrative complaint contained false claims. In her opposition, Ms. Hawkins fails to address directly the first finding made by the ALJ. She provides no record evidence undermining the ALJ's finding. Moreover, the first finding by the ALJ is thorough and careful, see ALJ Decision at 3-5 (covering history as to why the IEP meeting did not take place by September 29, 2006), and the Court therefore accords it due deference. Based on the ALJ's finding and Ms. Hawkins's failure to provide any evidence to refute that finding, the Court concludes that Ms. Hawkins and/or her attorneys did unreasonably protract the resolution of the case by unreasonably refusing to attend the IEP meeting.

As to the second finding by the ALJ, Ms. Hawkins does address it in her opposition but fails to make a persuasive argument. For the most part, Ms. Hawkins tries to place the blame on the District, claiming that it should have raised this concern prior to the administrative proceeding. Even if the District should have raised the issue prior to the administrative hearing, that does not mean that Ms. Hawkins is justified in having filed an administrative complaint containing false claims. Ms. Hawkins also asserts that any factual errors in the complaint were a result of the District's refusal to produce records, but she offers nothing to support this assertion. Finally, Ms. Hawkins suggests that she should be given leniency for any errors because she "is herself a product of the District's special education program and remains functionally illiterate." Reply at 6. However, there is no evidence of such before the Court; moreover, the fact is that Ms. Hawkins was represented by counsel. Given the poor response by Ms. Hawkins in her opposition, and the specificity in the ALJ's decision as to why there were four false allegations in the administrative complaint, the Court again finds that Ms. Hawkins and/or her attorneys unreasonably protracted the resolution of the case on this basis as well.

As to the District's remaining examples of how Ms. Hawkins and/or her counsel unreasonably protracted the resolution of the case (*i.e.*, by providing a written expert report that was

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clearly untimely, falsely accusing the District of refusing to produce witnesses, falsely accusing the District of not producing a document, and filing a meritless motion to exclude all of the District's exhibits), Ms. Hawkins fails to make any argument at all. Accordingly, the Court finds that there was also an unreasonable protraction as to these matters.

The question remains what sort of reduction the Court should make based on the conduct discussed above. The District has submitted a declaration from one of its attorneys which provides an estimate as to how much time was spent by the District in responding to certain unreasonable conduct by Ms. Hawkins and/or her counsel. See Sturges Decl. ¶¶ 6-10 (stating that he has an hourly rate of \$210 and that he spent some 15.5-17.5 hours responding). In the absence of any evidence to the contrary, the Court infers that Ms. Hawkins' attorney spent a similar amount of time on these matters. Accordingly, the Court deducts \$5,120, representing 16.00 hours at a blended hourly rate of \$320 (*i.e.*, the average of \$250 and \$390, Ms. Garcia and Ms. Adams's hourly rates).

The District's declaration, however, does not include any suggestion as to how to quantify time incurred because of the refusal of Ms. Hawkins and/or her attorneys to participate in the IEP. Thus, there is no evidence as to how many hours, if any, would have been saved had there been a prompt IEP meeting. The Court cannot conclude there would have been a greater likelihood that the issues in the case would have been narrowed as a result. Tellingly, the District's settlement offer in March 2007 was vastly different from what Ms. Hawkins demanded. It appears highly unlikely that the IEP would have obviated the due process hearing and this action.

Accordingly, the Court will not deduct any hours on this issue. The deduction for Ms. Hawkins and/or her attorneys' unreasonable protraction comes to **\$5,120**.

#### J. 10% Reduction

Based on the specific exclusions described above, see Part II.E-.I, *supra*, the Court shall take a reduction of \$40,304.50.[\[fn9\]](#) After taking the specific exclusions, the Court then applies the 10% reduction as described in Part II.F.3. This insures against double counting of deductions.

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Ms. Hawkins has sought a total of \$142,777.90 in fees and costs. With the reduction of \$40,304.50, that leaves a total of \$102,473.40. Ten percent of that figure is **\$10,247.34**. Thus, with the 10% reduction, the fee-and-cost award to Ms. Hawkins is **\$92,226.06** (i.e., \$102,473.40-\$10,247.34 = \$92,226.06).

#### K. Limited Success

Finally, the District argues that there should be a further reduction in any fee award based on the limited success achieved by Ms. Hawkins. The District is correct that the limited success framework, first articulated by the Supreme Court in *Hensley*, applies in IDEA cases. See *Aguirre v. Los Angeles Unified Sch. Dist.*, [461 F.3d 1114](#), [1121](#) (9th Cir. 2006) ("hold[ing] that attorney's fees awarded under [20 U.S.C. § 1415](#) are governed by the standards set forth by the Supreme Court in *Hensley* and its progeny"). However, in its opposition, the District focuses on the limited success that Ms. Hawkins obtained at the administrative level, not the success that Ms. Hawkins obtained in the civil action. See Part II.C, *supra*.

In the instant case, Ms. Hawkins obtained, as a result of the settlement agreement, "a full assessment including the neurological testing recommended by Plaintiff's consultant at the administrative hearing, fifty (50) hours of speech and language services and seventy-five (75) hours of tutoring." Mot. at 4. This was less than the relief that she had sought. For example, in her administrative complaint, she asked, *inter alia*, for 300 hours of compensatory education, the production of all of the Student's cumulative school records, and placement of the Student at a different school.

But simply because a party obtains less than complete relief does not mean there should necessarily be a deduction. See *NRDC, Inc. v. Winter*, No. 07-55294, 2008 U.S. App. LEXIS 19620, at \*24 (9th Cir. Sept. 16, 2008) ("[T]he fact that a settlement agreement does not encompass all relief requested in the complaint does not preclude a finding that a plaintiff has nevertheless obtained an 'excellent result.'"). The lodestar calculated by the Court above is presumptively reasonable. See *Cunningham v. County of Los Angeles*, [879 F.2d 481](#), [488](#) (9th Cir. 1988). The Ninth Circuit has held that, "in ordinary cases, a plaintiff's 'degree of success' or the 'results obtained' should be adequately accounted for in the lodestar[,] [and] [o]nly in rare or exceptional

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cases will an attorney's reasonable expenditure of time on a case not be commensurate with the fees to which he is entitled." *Id.* Ultimately, the question of whether there should be a departure from the lodestar turns on whether Ms. Hawkins achieved the central goal of her action against the District. See *Sorenson v. Mink*, [239 F.3d 1140](#), [1147](#) (9th Cir. 2001). While Ms. Hawkins presented various claims as to how the District had allegedly denied the Student a FAPE, the bottom line is that she sought to obtain for the Student a better educational program designed to meet his unique needs.

Furthermore, while a reduction in fees for limited success may be taken in some circumstances even where the plaintiff succeeds on some claims but not others, see *Hensley*, [461 U.S. at 435](#)

(stating that, where claims are related, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation"), [\[fn10\]](#) the Ninth Circuit has held any such deduction must be justified with some specificity. In *Quesada v. Thomason*, [850 F.2d 537](#), [539-40](#) (9th Cir. 1988), the court held, "the relief obtained justifies a lower fee if [a] plaintiff fail[s] to obtain relief on all claims, and if hours spent on unsuccessful claims were not needed to pursue successful claims." See *Velez v. Wynne*, No. 04-17425, 2007 U.S. App. LEXIS 2194, at \*5 (9th Cir. Jan. 29, 2007) (stating that "[t]he district court should have enumerated what .^. hours were non-compensable because they were not spent to achieve the result obtained, before calculating the lodestar figure, and then treated that figure as presumptively reasonable").

In the case at bar, the District has failed to demonstrate how many hours, if any, of Ms. Hawkins's counsel's time were spent on matters not necessary to pursue the claims on which she succeeded. The District failed to provide any analysis or specific evidence on this point. To be sure, some courts appear to have allowed a generalized percentage reduction on a kind of "gestalt"

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analysis of limited success. See, e.g., *Mrs. M. v. Tri-Valley Central Sch. Dist.*, 363 F. Supp. 2d 566, 573 (S.D.N.Y. 2005) (in case in which parties entered into a settlement agreement, applying an across-the-board reduction of 50% because "[i]t is impossible to separate out hours expended in pursuit of the issues on which plaintiff prevailed from hours expended in pursuit of other issues that were not reflected in the on-the-record, based on counsel's time records"); *Lathan v. Derwinski*, No. 89 C 663, 1991 U.S. Dist. LEXIS 10240, at \*9-10 (N.D. Ill. July 18, 1991) (in case in which parties entered into a settlement agreement, taking an across-the-board reduction of 50%; noting that, "[a]lthough the time sheets submitted by Lathan's attorneys do not, and probably could not in any accurate way, distinguish between time spent on successful and unsuccessful claims, we may nevertheless reduce the requested attorney's fees to more accurately reflect Lathan's success"). However, the Ninth Circuit appears to require a more specific quantitative analysis in overcoming the presumptive reasonableness of the lodestar. See *Velez*, 2007 U.S. App. LEXIS 2194, at \*5; *Quesada*, [850 F.2d at 539-40](#). Indeed, it would seem that most of the time spent in the administrative proceedings and in the case likely focused on whether the District failed to provide the Student a FAPE by not appropriately placing him and providing adequate support – the claim which provided the basis for relief obtained in the settlement agreement – as opposed to, e.g., the failure to produce all educational records or provide prior written notice of change of placement, the other claims asserted by Ms. Hawkins which did not yield any particular result. Absent any showing by the District of time spent by Ms. Hawkins's counsel on unsuccessful claims, this Court has no factual basis for taking deduction based on limited success.

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### III. CONCLUSION

For the foregoing reasons, Ms. Hawkins's motion for fees and costs is granted but the Court concludes that the fees sought are not reasonable. Ms. Hawkins is entitled to an award of \$92,226.06. Ms. Hawkins's motion to dismiss is also granted.

This order disposes of Docket Nos. 60, 66, 77, 82, and 83.

IT IS SO ORDERED.

[fn1] "Mot." refers to Ms. Hawkins's motion for fees and costs; "Opp'n" and "Reply" are the briefs related to the same motion.

[fn2] Only a court, and not an administrative hearing officer, has

the authority to award fees. See *Moore v. District of Columbia*, [907 F.2d 165](#), [170](#) (D.C. Cir. 1990).

[fn3] The one exception is the lodestar – *i.e.*, the District argues that, for both the administrative proceeding and the civil action, the hourly rates and the number of hours are unreasonable.

[fn4] At the hearing, the District argued that it did make concessions prior to the administrative hearing – *i.e.*, by making the settlement offer ten days prior to the hearing.

[fn5] Total = 0.80 hours.

[fn6] In light of the above, the Court does not address the District's second argument that fees may not be awarded because the counterclaim was not frivolous. The IDEA reflects that a higher standard for fees is demanded when the prevailing party is the educational agency, not the parent, see [20 U.S.C. § 1415](#)(i)(e)(B)(i)(I)-(II) (allowing for fees and costs to a prevailing educational agency when the parent's complaint or subsequent cause of action is, *e.g.*, frivolous, unreasonable, or without foundation or was presented for an improper purpose), but this does not address what the standard would be if the attorney for the parent were the prevailing party.

[fn8] That the burden is appropriately placed on the District is also supported by the legislative history for the Handicapped Children's Protection Act, the IDEA's predecessor. See 132 Cong. Rec. S. 9277 (1986) (co-sponsor Sen. Simon) (stating that a "court should not .^.^. enter into difficult attempts to make complex or arbitrary comparisons of different forms of relief" and that, "[f]or a court to deny an award of fees on the basis of a rejection of an offer, it must be *manifestly clear* that the relief offered was as favorable as that obtained") (emphasis added).

[fn9] \$6,538.80 + 116 + 237 + 3,120 + 727.20 + 1,170 + 23,275.50 + 5,120 = \$40,304.50.

[fn10] The Court agrees with Ms. Hawkins that it has already held that the various claims she advanced are related. See Docket No. 39 (order). Although this finding was made in the context of the Court's ruling dismissing the counterclaim, the same analysis as to whether the claims are related applies here. However, simply because the claims are all related does not mean that she is necessarily entitled to all her fees and costs. See, *e.g.*, *Connolly v. National Sch. Bus Serv.*, [177 F.3d 593](#), [597](#) (7th Cir. 1999) (rejecting argument "that percentage reductions beyond the lodestar are impermissible where a plaintiff's claim is based .^.^. on related factual and legal theories").

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